ASIA HOTEL SDN. BHD.

v.

MALAYAN INSURANCE (M) SDN. BHD.

HIGH COURT MALAYA, JOHOR BAHRU
RICHARD TALALLA J
[SUIT NO. 23-2 OF 1986]
10 DECEMBER 1991

CIVIL PROCEDURE: *Contradiction in the answer given in the insurance proposal form and evidence related to matters not raised in the pleadings - Whether material - Issue with regards to alleged knowledge of fire earlier - Not pleaded in defence - Whether material - Whether no reply to a defence implied joinder of issue on the said defence - Whether needful to rebut the same - Section 16(4) Insurance Act 1963, O. 14(1), O. 18 r. 14(1) RHC 1980, ss. 91, 92 Evidence Act 1950.*

WORDS AND PHRASES: *Whether to construe the policy by reference to the face value of the questions and answers in the proposal forms - The meaning of the word "you" in each of the questions - Whether referring exactly to the plaintiff and no one else - In this case whether the managing director of the plaintiff.*

The plaintiffs were the owners of Asia Hotel Batu Pahat and had insured their hotel with the defendants against fire and consequential loss as evidenced by two policies both dated 25 February 1985, one a fire policy and the other a consequential loss policy as they were popularly known.

On 11 May 1985 the Hotel was damaged by fire. The plaintiffs claimed indemnity under both policies. The defendants repudiated liability and refused to pay contending that both policies were obtained by misrepresentation, non-disclosure and concealment of a material fact, in that, the plaintiffs failed to disclose that one Dragon Nite Club of which one Lim Ah Kow the plaintiff's managing director (the managing director) was the managing or active partner, had lodged a fire claim with one Safety Life and General Insurance Sdn Bhd. as effectively pleaded in para. 12 of the statement of defence.

Inter alia, the defendant's agent testified that he was satisfied that the managing director had fully disclosed to him that he was a partner of the Nite Club and that there was a fire in 1979 at the Nite Club.

On behalf of the defendants it was submitted that the evidence of the managing director and the agent to explain how the answer to the questions were put in the two proposals should be disregarded as that evidence related to matters not raised in the pleadings.

Likewise the agent's alleged claim to knowing that the fire to the Nite Club had occured by reason of his having witnessed the same. It was pointed out that no reply was filed to the amended statement of defence.

Counsel for the plaintiffs sought to answer this complaint by referring to O. 18 r. 14(1) of the RHC 1980, wherein it is stated that if there is no reply to a defence there is an implied joinder of issue on that defence and so it was urged on behalf of the plaintiff, that there was no necessity to file a reply to rebut anything in the amended defence.

Held:

[1] It is axiomatic that pleadings operate to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective case and upon which the Court will be called upon to adjudicate between them. Pleadings operate so as to prevent trial by ambush and, if the mixed metaphors may be pardoned, encourage litigants to put their cards on the table.

[2] The learned Judge observed that (in the pleadings) not one word relating to the agents alleged knowledge of the fire to the Nite Club or advice regarding the filing of the proposal forms appeared to be forthcoming. Those matters were coiled in secrecy only to be sprung on the defendants at trial. It pointed to collusion between the plaintiffs and the agent.

[3] The learned Judge held the view that all the material facts complained of as not having been pleaded, should have been pleaded and it has to follow that all evidence relevant to the unpleaded facts must be disregarded and this Court do disregard the same.

[4] It follows that this Court has to construe the policy by reference to the face value of the questions and answers in the proposal forms and without reference to the extrinsic evidence relating thereto.

[5] In directing his mind to the meaning of the word "you" in each of the questions. The learned Judge observed that *prima facie* the word "you" must be construed as referring exactly to the plaintiffs and no one else. That appears to be clear and there is no need to have recourse to the *contra proferentem* rule which the plaintiff prayed in aid.

[6] The fire at the Nite Club was a material fact. This Court finds that the plaintiffs failed to disclose that fact to the defendants, that indeed the plaintiffs would appear to have concealed that fact from the defendants and that in the circumstances the defendants were entitled to repudiate liability under both the policies as they did and accordingly the plaintiffs' claim must fail.

[Order in terms.]

Cases referred to:

Janagi v. Ong Boon Kiat [1971] 2 MLJ 196 ***(cit)***
Tindok Besar Estate Sdn. Bhd. v. Tinjar Co. [1979] 2 MLJ 229 ***(cit)***
Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ (Rep) 330 ***(cit)***
Malayan Banking Bhd. v. Ong Kee Cheong Motors Sdn. Bhd. [1991] 3 CLJ (Rep) 215 ***(cons)***
China Insurance Co. Ltd. v. Ngau Ah Kau [1972] 1 MLJ 52 ***(dist)***
Glicksman v. Lancashire & General Assurance Co. Ltd. [1926] Ll LR 69 ***(foll)***
Schoolman v. Hall [1951] 1 Ll LR 139 ***(foll)***
Goh Chooi Leong v. Public Life Assurance Co. Ltd. [1964] MLJ 17 ***(foll)***
Locker & Woolf Ltd. v. Western Australian Insurance Co. Ltd. [1936] 54 Ll LR 211 ***(foll)***
Becker v. Marshall [1922] 12 L1 LR 413 ***(foll)***
Arthrude Press Ltd. v. Eagle Star & British Dominions Insurance Company Ltd. ***[1924] 19 L1 LR 373 (foll)***
Arterial Caravans Ltd. v. Yorkshire Insurance Co. Ltd. [1973] LLR QB 1 169 ***(foll)***
Newsholme Bros v. Road Transport and General Insurance Co. ***[1929] 2 KB 356***

Legislation referred to:

Contracts Act 1950, s. 13
Evidence Act 1950, ss. 91, 92
Insurance Act 1963, ss. 16(4), 44A
Rules of the High Court 1980, O. 18 rr. 8(1), O. 18 r. 14(1)

For the plaintiff - Tunku Farik Ismail; M/s Azim Ong & Krishnan
For the defendant - Khoo Eng Chin; M/s Khoo & Sidhu

JUDGMENT

Richard Talalla J:

The plaintiffs were the owners of the Asia Hotel, Batu Pahat and had insured their hotel with the defendants against fire and consequential loss as evidenced by 2 policies both dated 25 February 1985, one a fire policy and the other a consequential loss policy as they were popularly known. On 11 May 1985 the hotel was damaged by fire. The plaintiffs claimed indemnity under both policies. The defendants repudiated liability and refused to pay contending that both policies were obtained by misrepresentation, non-disclosure and concealment of a material fact, in that, the plaintiffs failed to disclose that one Dragon Nite Club (the Nite Club) of which one Mr. Lim Ah Kow, the plaintiffs' managing director (the managing director), was the managing or active partner, had lodged a fire claim with one Safety Life & General Insurance Sdn. Bhd., as effectively pleaded in para. 12 of the statement of defence.

It is common ground that each policy, being a contract between the plaintiffs and the defendants, was issued on the basis of a proposal, which was in the defendants' standard form, executed by the plaintiffs by hand of the managing director, that in each proposal the plaintiffs were warned pursuant to s. 16(4) of the Insurance Act 1963 (the Act) that it was to disclose in the proposal form fully and faithfully all the facts which the plaintiffs knew or ought to have known, otherwise the policy issued thereunder might be void. As to the fire policy the plaintiffs having made certain statements and provided certain particulars in the proposal thereafter declared and warranted that those statements and particulars were true and agreed that declaration was to be promissory and form the basis of the contract between the parties. As to the consequential loss policy, the plaintiffs agreed that the proposal should be the basis of the contract between the defendants and the plaintiffs.

In the proposal for the fire policy the defendants asked the question, "Have you ever suffered a loss by fire? If so, was any claim made upon an insurance company? Please give details." To that question the plaintiffs answered, "No". In the consequential loss policy the defendants posed the question, "Have you ever claimed on any company or insurer for loss by fire, lightning or explosion, in respect of any property now or formerly owned or occupied by you or for loss of profits? If so, give full particulars." To that question also the plaintiffs answered in the negative.

The managing director gave evidence in support of the plaintiffs' claim. It is clear from the evidence that, as far back as mid 1977 he was the sole proprietor of a hotel business known as Asia Hotel, that in 1978 he incorporated that business into the plaintiffs and became and remained the plaintiffs' managing director until he resigned from that office in 1986. He was also the sole proprietor of the Nite Club which he started also in mid 1977. In mid 1978 he took in a number of partners to the Nite Club. On 8 January 1979 Safety Insurance issued a fire policy in favour of the Nite Club. On 9 January 1979 the Nite Club caught fire, a claim was made under the policy and Safety Insurance met the claim.

The managing director testified that the 2 proposal forms were filled by an insurance agent, Lee Boon Keng (the agent), and that he, the managing director, signed them on behalf of the plaintiffs. He added that he answered the 2 questions above stated in the negative because he was signing on behalf of the plaintiffs and that he answered so because the plaintiffs had never before made any claim. With reference to the word "you" in each of the questions, the managing director said he took the word to mean the plaintiffs and added that, he did discuss this matter with the agent who advised him to do the same.

The managing director said in evidence that the plaintiffs had no interest whatsoever in the Nite Club. In the proposal form relative to the consequential loss policy a question (question 7) was asked and answered as follows:

> 7. Do you carry on business at any other premises? If so, give details and state if this insurance is to extend thereto.
>
> Answer: Dragon Nite Club. No.

The agent gave evidence. He admitted to being an insurance agent since 1973 and the agent of the defendants on 11 May 1985. He testified to knowing the plaintiff company and the managing director and to his filling the 2 proposal forms in his own hand. He said that he knew of a fire at the Nite Club that he witnessed the fire and he understood the managing director to be a partner of the Nite Club.

The agent said he discussed with the managing director before he filled in the proposal forms. He was asked why he answered the 2 questions in the proposal forms in the negative. In reply he said that he did so because in the fire proposal form most of the questions asked were relating to the proposer and in this case the proposal was the plaintiffs' and they had been operating business since 1975 without any fire claim experience or fire. He went on to testify that the word "you" in, the 2 questions meant the plaintiffs and that if the plaintiffs had not experienced any fire previously then the answers in the negative to the 2 questions were correct. As to the particulars filled in by him, the agent testified that he obtained the same from the managing director. He was asked by Counsel why the Nite Club was given as the answer to question 7. To this he replied that at the time the managing director was also one of the partners of the Nite Club and that was why the Nite Club was given as the answer to question 7. Finally the agent testified that he was satisfied that the managing director had fully disclosed to him that he was a partner of the Nite Club and that there was a fire in 1979 at the Nite Club.

That then was the case for the plaintiffs. The defendants called no evidence.

It was submitted on behalf of the defendants that the evidence of the managing director and the agent to explain how the answers to the questions were put in the 2 proposals should be disregarded as that evidence related to matters not raised in the pleadings. Likewise the agent's alleged claim to knowing that the fire to the Nite Club had occurred by reason of his having witnessed the same. It was pointed out that no reply was filed to the amended statement of defence The authorities cited in support of this proposition were *Janagi v. Ong Boon Kiat* [1971] 2 MLJ 196, *Tindok Besar Estate Sdn. Bhd. v. Tinjar Co.* [1979] 2 MLJ 229, and *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ (Rep) 330. Counsel for the plaintiffs sought to answer this complaint by referring to O. 18 r. 14 (1) of the Rules of the High Court 1980 wherein it is stated that if there is no reply to a defence, there is an implied joinder of issue on that defence and accordingly, so it was urged on behalf of the plaintiff, there was no necessity to file a reply to rebut anything in the amended defence. With respect I disagree. It is axiomatic that pleadings operate to define and delimit, with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective case and upon which the Court will be called upon to adjudicate between them. Pleadings operate so as to prevent trial by ambush and, if the mixed metaphors may be pardoned, encourage litigants to put their cards on the table. See *Malayan Banking Bhd. v. Ong Kee Cheong Motors Sdn. Bhd.* [l991] 3 CLJ (Rep) 215 at p. 221. What is more, there are the provisions of O. 18 r. 8(1) which reads as follows:

A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality:

(a) which he alleges makes any claim or defence of the opposite party not maintainable; or

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

It was further advanced on behalf of the defendants that in any event the offending evidence was inadmissible under s. 91 and 92 of the Evidence Act 1950. In *China Insurance Co. Ltd. v. Ngau Ah Kau* [1972] 1 MLJ 52, like in this case, the insured introduced evidence of the insurers agent, one Mr. Hoe, explaining how answers to certain questions in the proposal form were put in which evidence was admitted and accepted by the learned trial Judge. The insurer appealed to the Federal Court. Allowing the appeal Azmi LP, with whom Ali FJ agreed, held at p. 54 as follows:

Sections 91 and 92 of the Evidence Ordinance 1950 provide 'that where the terms of any contract have been reduced to the form of a document, no evidence, of any oral agreement or statement shall be admitted as between the parties to any such contract or their representatives-in-interest for, the purpose of contradicting, varying, adding to or subtracting from its terms, unless the matter can be brought under any of the provisoes to s. 92.

In my view, by reason of condition 9 the truth of the statements and answers to questions 6(A) and (B) in the proposal form have become terms of the contract and by reason of ss. 91 and 92 of the Evidence Ordinance it was not open to the plaintiff to make use of the evidence of Mr. Hoe to contradict or vary or add to or subtract from them.

It is true that in that case Suffian CJ, as he then was, dissented. However, even the dissenting judgment does not assist the insured plaintiffs in this case, because as stated in the dissenting judgment, see p. 55, the plaintiff in that case had taken the precaution of filing a reply and in that reply had said that he had informed the insurers' agent that he had made claims before, but the agent told him that, as the claims had been made more than three years before the proposal, there were no need to disclose them because the insured was entitled to a no-claim bonus if no claim had been made for more than three years and that in his reply the insured also said that the agent had explained to him that a certain question related only to insuring with other insurance companies. Thus the facts upon which the insured in the case before the Federal Court was relying were fully pleaded in his reply whereas in this case there was no such pleading at all.

Since the decision of the Federal Court above stated, the Insurance Act, 1963 has been amended by the introduction of s. 44A which came into effect on 1 November 1980 by virtue of Gazette Notification 440 of l980 dated 28 August 1980. This new section reads as follows:

44A. (1) A person who has at any time been authorised as its agent by an insurer and who solicits or negotiates a contract of insurance in such capacity shall in every such instance be deemed for the purpose of the formation of the contract to be the agent of the insurer and the knowledge of such person relating to any matter relevant to the acceptance of the risk by the insurer shall be deemed to be the knowledge of the insurer.

(2) Any statement made or any act, done by any such person in his representative capacity shall be deemed, for the purpose of the formation of the contract, to be a statement made or act done by the insurer notwithstanding any contravention of s. 16A or any other provision of this Act by such person.

(3) This section shall not apply

(a) Where there is collusion or connivance between such person and the proposer in the formation of the contracts; or

(b) Where such person has ceased being its agent and the insurer has taken all reasonable steps to inform or bring to the knowledge of potential policy owners and the public in general the fact of such cessation.

The plaintiff looked to this new section for support. Whether the new section has the effect of negativing the majority decision in the Federal Court I find is a question which it is not necessary for me to rule on. What I do find is that inasmuch as the insured plaintiffs were praying in aid the new section to establish their case it was imperative that all the material facts on which they were relying so to do should have been pleaded. If they had done so the insurer defendants would or should have been alerted to those facts and by reference to subsection (3) immediately look into questions *inter alia* of collusion and connivance and if there appeared to be any jiggery-pokery between the agent and the insured they would certainly have filed a rejoinder pleading the same and possibly joined the agent as a third party claiming against him contribution or indemnity. The defendants' repudiation of liability and the grounds for the same as stated in para. 1 hereof was contained in a letter from the defendants' solicitor to the plaintiff dated as far back as 21 December 1985 since when correspondence were exchanged between the solicitors for the respective parties. Yet, not, one word relating to the agent's alleged knowledge of the fire to the Nite Club or advice regarding the filling of the proposal form appeared to be forthcoming. Those matters were coiled in secrecy only to be sprung on the defendants at trial. It pointed to collusion between the plaintiffs and the agent.

I am of the view that all the material facts complained of as not having been pleaded, should have been pleaded and it has to follow that all evidence relevant to the unpleaded facts must be disregarded and I do disregard the same.

It follows that I have to construe the policy by reference to the face value of the questions and answers in the proposal forms and without reference to the extrinsic evidence relating thereto.

Before doing so it is desirable to have in mind the observations of Viscount Dunedin in the House of Lords case of *Glicksman v. Lancashire & General Assurance Co. Ltd.* [1926] Ll LR 69 at p. 7l where it was said:

> Then I come to the law of it. The law has often been stated, but perhaps it is just, as well to state it again. A contract of insurance is denominated a contract *uberrimae fidei*. It is possible for persons to stipulate that answers to certain questions shall be the basis, of the insurance, and if that is done then there is no question as to materiality left, because the persons have contracted that there should be materiality in those questions; but quite apart from that and alongside of that there is the duty of no concealment of any consideration which would affect the mind of the ordinary prudent man in accepting the risk.

Those observations were adopted by Lord Justice Cohen in *Schoolman v. Hall* [1951] 1 Ll. LR 139 where he said at p. 142:

> So, I think, applying those observations here, while the insurers have stipulated that the answers to the fifteen questions "shall be the basis of the contract," that only has the effect of preventing any argument as to the materiality of those questions should dispute arise, but it does not relieve the proposer of his general obligation at common law to disclose any material which might affect the risk which was being run or which might affect the mind of the insurer as to whether or not he should issue a policy.

Then again as Gill J (as he then was) said in *Goh Chooi Leong v. Public Life Assurance Co. Ltd.* [1964] MLJ 1 at p. 7.

> It is trite law that the contract of insurance is a contract *uberrimae fidei* which can be avoided for non-disclosure of material facts.

With the observations above stated in mind reference is made to the following authorities. In *Locker & Woolf Ltd. v. Western Australian Insurance Co. Ltd.* [1936] 54 Ll LR 211, it was held that failure to disclose a previous fire loss of one of the partners of the firm while engaged in business on his own more than l0 years before and refusal of motor insurance applied for by the partnership on being asked so in the proposal amounted to non-disclosure of material facts entitling the insurer to repudiate the contract. In *Becker v. Marshall* [1922] 12 Ll LR 413 it was held that the previous losses of a partner by burglary ought to have been disclosed when the proposal for insurance was made by the firm a question in the proposal being, "Have you ever sustained a loss?" It is realised that in these two cases the insured was a firm consisting of individuals and therefore quite naturally the questions in the proposal form should have been treated as answerable by each partner. In *Arthrude Press Ltd. v. Eagle Star & British Dominions Insurance Company Ltd.* [1924] 19 Ll LR 373, it was held that the previous refusal by another insurance company of a proposal, made by the owner of a business later formed into the plaintiff limited company under his managing directorship before its formation, not disclosed in a proposal for insurance by the plaintiff company after its formation was concealment of a material fact. In that case the question posed in the proposal was, "Has your insurance ever been declined by any office?" The answer was in the negative. Even more to the point is *Arterial Caravans Ltd. v. Yorkshire Insurance Co. Ltd.* [1973] LLR QB Vol.1 p. 169. In that case S was a sole director of a company incorporated in 1955, its object to sell caravans. By 1957 it became dormant. A second company also with S as sole director was incorporated in 1956, to manufacture caravans and had a fire insurance policy covering its premises where in 1965 there was fire resulting in a claim and a consequent large payment by the insurer. Thereafter it went into liquidation. S then re-activated the first incorporated company and moved it to the site occupied by the second company. Again fire insurance was taken out, a fire took place and the premises were damaged. The insurer repudiated liability on the ground that the loss suffered by the previous fire had not been disclosed. Chapman J agreed and the insured failed in his claim. The *Arterial Caravans* case was said by Counsel for the plaintiff to be factually distinguishable, for in that case S being the sole director of the company, the business of the two companies being substantially the same namely dealing with caravans and on both occasions the fire took place at the same premises, whereas in the instant case none of these matters pertained, in particular the managing director was not the sole owner of the Nite Club nor the sole director of the plaintiff company, their business was different, one a night club and the other a hotel and they were separately located.

Counsel for the plaintiffs relied on the *dictum* of Scrutton LJ in *Newsholme Bros. v. Road Transport and General Insurance Co.* [1929] 2 KB 356 where at p. 363 the learned Judge held that insurance companies run the risk of the contention that matters they do not ask questions about are not material, for, if they were, they would ask questions about them. Thus, it was argued before me, the insurer in the instant case should have elaborated on the word "you" to include directors and others when addressing questions in the proposal form. Counsel's argument is not without merit. It accords with good business sense and fairness. It speaks for clarity as against confusion. It behoves insurers and all persons and authorities concerned to ensure that in appropriate instances persons addressed in the proposal do include those having a financial interest in as well as management of the proposer.

However, I must keep in mind the paramount rule that each case has to be decided on its own facts. The cases above stated do, of course, serve as a useful guide. Accordingly against this background of cases I now proceed to examine the facts in this case. I turn to the meaning of the word "you" in each of the questions. To my mind *prima facie* the word "you" must be construed as referring exactly to the plaintiffs and no one else. That appears to be clear and there is no need to have recourse to the *contra proferentem* rule which the plaintiffs prayed in aid. It is the defendants' case that the word in the second person refers not only to the plaintiffs but also to the person or persons having a financial interest in and the management of the company, in this instance the managing director. To this end the defendants called as a witness Mr. Anthony Gerard Dibble, General Manager of Persatuan Insuran Am Malaysia (PIAM) to speak to the same as in fact he did. Mr. Dibble testified that PIAM had a standard proposal form for fire insurance which all insurance companies had to use and the proposal form for such insurance in this case was in the standard form, Mr. Dibble then further testified that the word "you" in that form meant anyone connected in a financial fashion to the risk proposed. With or without the evidence of Mr. Dibble certainly that is how the defendant construed the word. It seemed to me that the plaintiffs through the managing director were also of the same mind for in answering question 7 he provided by way of answer the Nite Club. Thus both parties to the contract were agreed upon the same thing, in the same sense and must be taken to have consented so. The plaintiffs are therefore caught by s. 13 of the Contracts Act 1950, which reads as follows:

> Two or more persons are said to consent when they agree upon the same thing in the same sense.

As between the parties there was no mistake in this particular case. The evidence of the managing director and the agent, as set out above, corroborates this. Why then did not the managing director construe the word "you" in the two questions in the same manner as he would appear to have construed it in question 7? The answer to my mind, is ominously obvious - to conceal the fact of the fire at the Nite Club which fact if disclosed might well have led to the defendants declining the proposal.

There was another point. In the fire proposal form the plaintiffs were asked, "How long have you carried on business in those premises or elsewhere ?" The answer, "Since 1976". But the plaintiff company was incorporated in 1978 before which the managing director was running the business as its sole proprietor. If the word "you" was exclusively referable to the plaintiff company as the plaintiffs would have it, why was this question so answered?

The fire at the Nite Club was a material fact. I find that the plaintiffs failed to disclose that fact to the defendants, that indeed the plaintiffs would appear to have concealed that fact from the defendants and that in the circumstances the defendants were entitled to repudiate liability under both the policies as they did and accordingly the plaintiffs' claim must fail.

The action is dismissed with costs to be taxed.

Also found at [1992] 2 CLJ 1185